

First Amendment Constraints on the Award of Attorney's Fees Against Civil Rights Defendant-Intervenors: The Dilemma of the Innocent Volunteer

DAVID GOLDBERGER*

I. INTRODUCTION

Although the Civil Rights Attorney's Fees Awards Act of 1976¹ has been successful in encouraging the private enforcement of federal civil rights laws by aggrieved plaintiffs, it is increasingly becoming an obstacle to aggressive advocacy by intervenors aligned with defendants accused of civil rights violations.² This is occurring because many federal district court judges presiding over civil rights cases indiscriminately award fees against any party that has associated itself with losing defendants whether or not the party is guilty of the wrongdoing which triggered the litigation.³ As a consequence, a litigant who is innocent of wrongdoing but who would like to intervene as a party in a civil rights case to support the defendant's viewpoint must decide whether engaging in advocacy to support the defendant is worth the risk of a fees assessment in the event that the civil rights plaintiff ultimately wins the case.

The problem has arisen because, according to the terms of the Act, a federal court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."⁴ This language has been construed to create a presumption in favor of awarding of attorney's fees to prevailing private plaintiffs except under special circumstances.⁵ As a result, fee awards under the Act have become routine;⁶ caselaw on the subject has burgeoned; and academic articles

* Professor of Law, The Ohio State University College of Law; B.A. 1963, J.D. 1967, University of Chicago. I deeply appreciate the thoughtful comments of Professor Neil Komisar, the encouragement of Professor Richard Saphire, and the careful research and editing of my research assistant, Sara Lioi, in the course of the preparation of this article.

1. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1982). For a general description of virtually all aspects of the Act, see E. R. LARSON, *FEDERAL COURT AWARDS OF ATTORNEY'S FEES* (1981).

2. The potential that the award of attorney's fees has for deterring advocacy of meritorious civil rights claims is discussed in Comment, *Protecting Defendant-Intervenors from Attorneys' Fees Liability in Civil Rights Cases*, 23 HARV. J. ON LEGIS. 579, 585-89 (1986). See also *Planned Parenthood of Memphis v. Alexander*, No. 78-2310 (W.D. Tenn. Dec. 23, 1981) (denial of award of fees against defendant-intervenors aligned with losing civil rights defendants because of fear that such an award would chill such advocacy on controversial issues).

3. See *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of White Plains*, 533 F. Supp. 1054, 1061-63 (S.D.N.Y. 1982) (award of fees against union intervening as defendant and unsuccessfully opposing affirmative action decree on grounds that it would cause reverse discrimination); *Decker v. United States Dep't of Labor*, 564 F. Supp. 1273, 1279-80 (E.D. Wis. 1983) (church officials ordered to pay fees after intervening as defendants to make unsuccessful argument that a public employment program from which they received salaries did not violate the establishment clause). See also *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268, 1272-75 (N.D. Ohio 1984) (intervening parents of unmarried minor daughters of child-bearing age held liable for attorney fees after unsuccessfully supporting abortion ordinance); *Charles v. Daley*, Nos. 79-C-4541 & 79-C-4548 (N.D. Ill. Apr. 22, 1985) (anti-abortion intervenors ordered to pay substantial fees because they had aligned themselves with unsuccessful governmental defendants), *motion to amend denied*, Nos. 79-C-4541 & 79-C-4548 (N.D. Ill. March 6, 1986) (LEXIS, Genfed library, Dist file), *appeal docketed*, No. 86-1552 (7th Cir. April 9, 1986).

4. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1982).

5. See, e.g., *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

6. One commentator contends that the use of the Civil Rights Attorney's Fees Awards Act has become so

have become commonplace.⁷ While the routine award of attorney's fees in civil rights cases appears consistent with Congressional intent, many litigants innocent of any wrongdoing have had to bear the burden of paying substantial fees to the prevailing plaintiffs' lawyers merely because they have taken the side of losing defendants. Typically such litigants have voluntarily intervened or otherwise appeared on the losing defendant's side in order to advocate strongly held constitutional and legal positions. They have been ordered to pay fees because they aligned themselves with the losing side even though they were volunteers and were not parties against whom relief could be granted.⁸

Thus, right-to-life organizations that have intervened on the side of losing state officials in abortion cases have been assessed thousands of dollars in attorney's fees because they argued in defense of statutes subsequently held to be unconstitutional.⁹ White public employee unions have also been ordered to pay attorney's fees because they intervened alongside losing defendants in antidiscrimination cases, in which they, along with the targeted defendants, were unsuccessful in opposing affirmative action plans which they argued had caused reverse discrimination.¹⁰

Unsuccessful efforts have been made to persuade judges to forgo imposing attorney's fees in such cases. These efforts have centered on the claim that the Act does not apply to volunteer litigants who have violated no rights and have intervened in litigation solely in order to advocate a viewpoint protective of the interests that they champion.¹¹ Opponents of the fee awards assume that the primary goal of the Attorney's Fees Act is to force civil rights violators to pay their victims' fees, not to penalize innocent volunteers for engaging in legitimate courtroom advocacy. Thus, it is contended that appearance in litigation as an innocent volunteer is a special circumstance which should exempt the volunteer from the Act's coverage.¹²

Many courts confronted with such arguments have ruled that all parties who are actually or functionally losing defendants are obligated to pay fees under the Act, without regard to their volunteer status.¹³ Others have held that the presence of an

widespread that it has "seriously eroded the foundations" of the American Rule. Rader, *The Fee Awards Act of 1976: Examining the Foundation for Legislative Reform of Attorney's Fees Shifting*, 18 J. MARSHALL L. REV. 77, 80-81 (1984).

7. *Id.* at 79-80.

8. See *infra* text accompanying notes 37-44 and 50-57.

9. See, e.g., *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1275, 1294 (N.D. Ohio 1985) (intervenor ordered to pay \$18,435); *Charles v. Daley*, Nos. 79-C-4541 & 79-C-4548 (N.D. Ill. April 22, 1985) (intervenor ordered to pay \$90,643.90), *motion to amend denied*, Nos. 79-C-4541 & 79-C-4548 (N.D. Ill. March 6, 1986) (LEXIS, Genfed library, Dist file), *appeal docketed*, No. 86-1552 (7th Cir. April 9, 1986).

10. *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of White Plains*, 533 F. Supp. 1054, 1061-63 (S.D.N.Y. 1982). See also *Baker v. City of Detroit*, 504 F. Supp. 841 (E.D. Mich. 1980) (award of fees to prevailing defendant-intervenor to be paid by losing defendant on grounds that the prevailing defendant-intervenor was a functional plaintiff and the losing plaintiff was a functional defendant), *aff'd sub nom.* *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *vacated on other grounds*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

11. A fuller articulation of this argument appears in Comment, *supra* note 2, at 584-87. See also *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of White Plains*, 533 F. Supp. 1054, 1061-62 (S.D.N.Y. 1982); *Kirkland v. New York State Dep't of Correctional Serv.*, 524 F. Supp. 1214, 1218-19 (S.D.N.Y. 1981).

12. *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268, 1272 (N.D. Ohio 1984).

13. See *supra* note 10. See also *May v. Cooperman*, 578 F. Supp. 1308, 1316-18 (D.N.J. 1984) (fees assessed against losing defendant-intervenor who were treated as traditional wrongdoers. The defendant-intervenor was legislators who passed the unconstitutional law. It is arguable that, because they enacted the law, the legislators were actually wrongdoers. Nonetheless, the court made no effort to distinguish between the liability of innocent volunteers and

innocent volunteer in a lawsuit creates a special circumstance which justifies excusing the volunteer from an obligation to pay fees under the Act.¹⁴ Unfortunately, neither judges nor commentators have articulated a rationale which satisfactorily reconciles the apparently contradictory cases. Instead, judges on all sides of the issue have tended to muddle through the difficult questions posed by the appearance of innocent volunteers in litigation, making ad hoc judgments which are oblivious to the analytic tension created by contradictory decisions.

It is the purpose of this Article to suggest an approach to deciding fee petitions against innocent volunteers which looks to relevant first amendment doctrines inexplicably neglected by judges and scholars. The Article explains why neither the language of the Act nor its legislative history provides a definitive solution to this problem.¹⁵ As an alternative, it outlines several Supreme Court decisions articulating the first amendment right of access to the courts and proposes that these cases be taken into account when deciding whether to assess fees against innocent volunteers.¹⁶ The Article argues that in applying the Act the judiciary is constitutionally bound to consider the degree to which the award of attorney's fees constitutes a penalty for advocating the wrong viewpoint in court, rather than for violating a plaintiff's constitutional rights. It concludes that the first amendment doctrines protecting access to the courts also protect innocent volunteers from having to pay attorney's fees merely for participating in litigation on the losing side.

II. THE SOURCE OF THE PROBLEM

A. The "Prevailing Plaintiff" Rule

The practice of imposing attorney's fees on innocent volunteers is rooted in the well-established construction of the Civil Rights Attorney's Fees Awards Act which requires that fees must be awarded to prevailing plaintiffs except in special circumstances.¹⁷ It originated in pre-Act cases awarding attorney's fees to plaintiffs in employment discrimination cases. Thus, in *Newman v. Piggie Park Enterprises*,¹⁸ the Supreme Court held that prevailing plaintiffs who were victims of employment discrimination "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."¹⁹ The *Newman* decision rested on the assumption that the availability of fee awards insured private enforcement of Title VII. The incentive for private enforcement was further strengthened by the additional

wrongdoers.), *aff'd in part and appeal dismissed in part*, 780 F.2d 240 (3rd Cir. 1985). A more typical example is *Robideau v. O'Brien*, 525 F. Supp. 878 (E.D. Mich. 1981), which awarded fees to plaintiff prisoners against a guards' union after the union's motion to intervene on behalf of defendants was denied.

14. See *Kirkland v. New York State Dep't of Correctional Serv.*, 524 F. Supp. 1214 (S.D.N.Y. 1981). See also *Planned Parenthood of Memphis v. Alexander*, No. 78-2310 (W.D. Tenn. Dec. 23, 1981).

15. See *infra* text accompanying notes 25-30.

16. See *infra* text accompanying notes 78-95.

17. Tamanaha, *The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenor in Civil Rights Litigation*, 19 HARV. C.R.-C.L. L. REV. 109, 125, 145-50 (1984).

18. 390 U.S. 400 (1968).

19. *Id.* at 402.

requirement articulated in *Christiansburg Garment Co. v. EEOC*²⁰ that attorney's fees not be awarded against a losing plaintiff unless the prevailing defendant could show that the plaintiff's case was frivolous or irresponsible.

Following *Newman* and prior to the passage of the Attorney's Fees Act, many federal judges awarded attorney's fees to prevailing plaintiffs in a broad range of civil rights and other public interest cases.²¹ These judges held that fees were proper in such cases because the plaintiffs served as private attorneys-general whose lawsuits benefited the public interest.²² In response to vigorous opposition to this practice by losing defendants, the Supreme Court held, in *Alyeska Pipeline Service Co. v. Wilderness Society*,²³ that, absent legislative authorization, courts were not empowered to award fees. The Court stated that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation."²⁴

Congress quickly responded by authorizing the award of fees in civil rights cases pursuant to the Civil Rights Attorney's Fees Award Act.²⁵ The Act explicitly designated the particular civil rights laws which could be the basis for an attorney's fee petition filed by the prevailing plaintiff. In passing the Act, Congress created an explicit exception to the traditional American Rule requiring all parties to absorb their own fees.²⁶ It shifted fees to losing civil rights defendants by obliging them to pay their opponents' fees as well as their own. According to the legislative history of the Attorney's Fees Act, Congress intended that the award of attorney's fees to prevailing plaintiffs would encourage private persons with civil rights claims to seek their own redress rather than looking to the cumbersome machinery of government to obtain redress for them.²⁷ Congress believed that the award of attorney's fees to prevailing plaintiffs would offset the deterrent effects of the high costs of litigation and the superior resources of government and many private civil rights defendants.²⁸

Unfortunately, nothing in the Act or its legislative history addresses the problem of the innocent volunteer. The statutory language and the legislative history refer to defendants as though they comprise a class of individuals with uniform characteristics

20. 434 U.S. 412 (1978).

21. See Note, *Surveying the Law of Fee Awards Under the Attorney's Fees Awards Act of 1976*, 59 NOTRE DAME L. REV. 1293, 1293 n.4 (1984); Rader, *supra* note 6, at 78. See also M. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES ¶ 1.02 [2] [a] [vii] [B] (1985).

22. See generally Note, *Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act: What Special Circumstances Render an Award Unjust?*, 51 FORDHAM L. REV. 320, 322-23 (1982).

23. 421 U.S. 240 (1975).

24. *Id.* at 247.

25. E. R. LARSON, *supra* note 1, at 5.

26. See *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-60 (1975) (discussion of the American Rule and judicially fashioned exceptions to it); see also Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984) (a history of the American Rule). For critiques of the American Rule as a burden on the initiation of litigation by aggrieved persons without financial resources, see Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966) and Goodhart, *Costs*, 38 YALE L.J. 849 (1929). For an opposing view, see Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 437-39 (1973), which explains how the American Rule creates more incentive for persons with limited resources to sue than does the English Rule.

27. S. REP. NO. 1011, 94th Cong., 2d Sess. 2-5, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5909-13.

28. H.R. REP. NO. 1558, 94th Cong., 2d Sess. 2-3, 7 (1976).

requiring uniform treatment.²⁹ The sole language in the legislative history which suggests that defendants do not necessarily comprise a homogeneous class appears in a terse footnote indicating that occasional parties seeking to enforce civil rights claims might appear in litigation as defendants or defendant-intervenors. The footnote suggests that, if such defendants were making civil rights claims, they too would be entitled to fees if they prevailed.³⁰ However, there is nothing in the footnote or elsewhere in the legislative history to indicate that losing defendants are distinguishable from, or should be treated differently from, one another.

Since the passage of the Act, the judiciary has followed *Newman* by awarding fees to prevailing plaintiffs under the prevailing plaintiff rule so consistently that commentators now view it as a presumption.³¹ Indeed, the presumption that prevailing plaintiffs are entitled to fees has become so strong that exceptions based on special circumstances have been few and far between.³² In contrast, when plaintiffs have lost, they have not usually been held to be liable for fees except when the entire lawsuit was irresponsible or frivolous.³³ The rationale for the imposition of fees on irresponsible plaintiffs is that they are abusing the judicial process and wasting the court's and the opposing litigant's resources.³⁴ Similarly, when litigants have engaged in abusive or irresponsible litigation tactics, they, too, have been ordered to pay the resulting fees incurred by their opponents as a penalty.³⁵

B. Application of the Rule to the Dilemma of the Innocent Volunteer

At the same time that the judiciary began to implement the presumption favoring awards to prevailing plaintiffs, it also began to make awards against innocent volunteers aligned with losing defendants because the volunteers were asserting arguments not traditionally associated with civil rights plaintiffs.³⁶ Although the volunteers characterized themselves as the functional equivalent of civil rights plaintiffs who were merely nominal defendants, the courts frequently disagreed and ordered them to pay fees because they were aligned on the same side as actual civil rights violators.

29. *Id.* at 7-8.

30. S. REP. NO. 1011, *supra* note 27, at 4 n.4. Presumably this footnote was intended to address the problem posed by cases like *Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980), in which the defendant teacher suffered a civil rights violation at the hands of the plaintiff school district which subsequently initiated suit as a defensive tactic. See also *Kirchberg v. Feenstra*, 708 F.2d 991 (5th Cir. 1983) (awarded fees to female defendant who prevailed on civil rights sex discrimination defense to a foreclosure action which sought to oust her from real property held jointly with her husband). Cf. *Donnell v. United States*, 682 F.2d 240 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983); *Commissioners Court of Medina County v. United States*, 683 F.2d 435, 440 n.5 (D.C. Cir. 1982).

31. M. DERFNER & A. WOLF, *supra* note 21, at ¶ 10.02[3].

32. *Id.*

33. Rader, *supra* note 6, at 92-93.

34. *Haycraft v. Hollenbach*, 606 F.2d 128, 133 (6th Cir. 1979) (awarded fees against losing defendant-intervenor because the intervention "amounted to obstinacy in resisting [plaintiffs'] realization of their clearly defined legal rights").

35. See, e.g., FED. R. APP. P. 38, which permits courts of appeals to award just damages and costs to an appellee if the court determines that the appeal is frivolous. See also FED. R. CIV. P. 37, which provides for sanctions including fees to be awarded against parties not complying with discovery responsibilities.

36. The most comprehensive treatment of this problem is found in Tamanaha, *supra* note 17.

Typical of the judicial inclination to enforce the prevailing plaintiff rule against innocent volunteers is the decision in *Vulcan Society of Westchester County, Inc. v. Fire Department of the City of White Plains*.³⁷ In that case, minority group plaintiffs challenged racially discriminatory recruitment practices and employment policies of several municipal fire departments. During the course of the litigation, firefighters' unions voluntarily intervened on the defendants' side to oppose any affirmative action remedy which might hurt non-minority union members. Following a settlement of the case which was favorable to the minority plaintiffs, the plaintiffs sought attorney's fees from the intervening firefighters' unions as well as the other defendants. Although the plaintiffs technically qualified for fees under the prevailing plaintiff rule, the district court was troubled by the request for entry of a fees order against the intervening defendant firefighters' unions. It observed:

The union intervenors . . . present a special case. The EEOC [previously] found no probable cause to believe the unions were guilty of any illegal conduct. Moreover, the unions were not in a position to grant or deny the relief sought by plaintiffs. A suit against the defendants here did not amount to a suit against the unions.³⁸

Despite its concerns, the trial court interpreted the prevailing plaintiff rule to require it to favor the advocacy of the plaintiffs over the advocacy of the innocent volunteer intervenors. Thus, it ordered the intervening unions to pay attorney's fees. The court explained:

While the unions could not have been required to provide plaintiffs any part of the relief they sought, once the unions intervened as defendants they placed themselves in a position to prevent plaintiffs from obtaining relief. Then, they litigated vigorously in an attempt to deny plaintiffs various aspects of the relief that plaintiffs sought, and ultimately capitulated on much that they had opposed³⁹

Somewhat different reasoning was employed to reach the same result in *Charles v. Daley*.⁴⁰ In *Charles*, members of a right-to-life organization had intervened as defendants in order to defend the constitutionality of a state statute restricting access to abortions. They intervened on the side of defendant government officials to assert the interests of unborn fetuses. Following a judicial declaration invalidating the statute, the defendant-intervenors were ordered to pay the plaintiffs \$90,643.90 in attorney's fees.⁴¹ The court rejected the argument that the intervenors should be excused from attorney's fees because they had violated no one's rights and could not have been named as defendants in the original complaint. It explained:

Where an intervenor takes a strong role and creates a substantial barrier to a plaintiff's realization of a constitutional right, it would be unfair to permit that party to walk away from the plaintiff's fees and costs award. It may not be unfair to the plaintiffs, who should

37. 533 F. Supp. 1054 (S.D.N.Y. 1982).

38. *Id.* at 1061.

39. *Id.* at 1062.

40. Nos. 79-C-4541 & 79-C-4548 (N.D. Ill. April 22, 1985), *motion to amend denied*, Nos. 79-C-4541 & 79-C-4548 (N.D. Ill. March 6, 1986) (LEXIS, Genfed library, Dist file), *appeal docketed*, No. 86-1552 (7th Cir. April 9, 1986).

41. *Id.*

eventually recover their fees and costs from one party or another. However, where intervenors are full participants, it would be unfair to the other defendants to impose upon them more than their fair share of the plaintiff [sic] expenses.⁴²

A similar result was reached in *Akron Center for Reproductive Health v. City of Akron*⁴³ where the district court ordered right-to-life defendant-intervenors to pay attorney's fees after their unsuccessful attempt to help government defendants defend an Akron ordinance regulating the performance of abortions. The court concluded that the defendant-intervenors' advocacy of a constitutional claim was not the same as an assertion of a constitutional claim by the civil rights plaintiff. The court reasoned that:

The intervenors voluntarily chose to align themselves with the city-defendants in opposing the relief sought by the plaintiff in this action. As such, they acted in concert with the city-defendants and contributed to the effort required of the plaintiffs to substantiate their position [that the anti-abortion ordinance was unconstitutional] in court.⁴⁴

In spite of the obvious simplicity of automatically awarding fees against all parties on the side of losing defendants, other lower court judges have been uncomfortable with the reflexiveness of such an approach. These judges have construed the Attorney's Fees Act to deny fee awards against losing volunteer litigants when the volunteers appeared to play a role similar to that of civil rights plaintiffs. An example of this approach is the district court decision in *Kirkland v. New York State Department of Correctional Services*.⁴⁵ Minority group plaintiffs successfully challenged a civil service examination used by the New York Department of Corrections for promotion decisions on the ground that the exam discriminated against black and Hispanic candidates. Following the entry of an injunction decree prohibiting use of the examination, white provisional sergeants whose advancement was hampered by the decree intervened as defendants alongside the New York Department of Corrections to oppose the decree. The sergeants contended that the decree imposed an unconstitutional form of reverse discrimination. Following extensive additional trial and appellate proceedings, the reverse discrimination argument of the defendant-intervenors was rejected and the injunction was upheld.⁴⁶

After their victory on the merits, the prevailing plaintiffs moved for attorney's fees from both the original defendants and the defendant-intervenors. The intervenors resisted the motion, arguing that they had joined the litigation voluntarily to raise their own constitutional claims—not because they were guilty of violating anyone's civil rights. The district court ruled that:

Since the intervenors here were neither actors in the constitutional violation nor obstructionists in the vindication of plaintiffs' rights, they are entitled to the same encouragement

42. *Id.*

43. 604 F. Supp. 1268 (N.D. Ohio 1984).

44. *Id.* at 1273.

45. 524 F. Supp. 1214 (S.D.N.Y. 1981).

46. *Kirkland v. New York State Dep't of Correctional Serv.*, 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

as any other party presenting good faith constitutional claims. Such a determination does not compromise the policy of encouraging "private attorneys general" by awarding them attorney's fees. It simply results from a set of circumstances in which, in effect, there are two sets of "plaintiffs" each of which has brought claims in good faith . . . [F]orcing intervenors to bring their constitutional claims only at the risk of becoming liable for their opponents' fees if they do not prevail may substantially deter such intervention by persons with competing constitutional claims. The law would not be well served by such a result for, especially in the context of the development of constitutional doctrine and remedies, it is incumbent on the court to consider all the competing interests at stake.⁴⁷

Similarly, in *Planned Parenthood of Memphis v. Alexander*,⁴⁸ the district court refused to award fees. Following a successful challenge to the constitutionality of a Tennessee anti-abortion law, the prevailing plaintiff moved for an award of attorney's fees against parties who had voluntarily intervened to defend the constitutionality of the statute. Plaintiffs sought fees because they had opposed the intervention and because the intervenors, who were very actively involved in all phases of the litigation, had selected most or all of the witnesses called by the defense. The court, however, citing the *Kirkland* decision, ruled that it would not assess fees against the intervenors because they had acted in good faith and had not functioned as obstructionists. It observed:

To allow the plaintiffs' claim for very substantial fees and costs in these circumstances against intervenors could well chill or, as a practical matter, even preclude the opportunity of persons and groups legitimately concerned about enforcement of, or challenge to, controversial laws relating to important, delicate and sensitive personal rights, to express their positions or become involved before the courts.⁴⁹

Some courts use a variant of this approach based on the viewpoint of the litigant to justify awarding fees against losing plaintiffs who ordinarily would be exempt from the payment of attorney's fees. These courts have reasoned that losing plaintiffs who advocate viewpoints which make them functional defendants should be assessed fees. These courts have also reasoned that winning defendants are entitled to fees when they advocate viewpoints which make them functional plaintiffs.

An example of this variant appears in the district court decision in *Baker v. City of Detroit*.⁵⁰ Several white Detroit police officers, supported by the Detroit Police Lieutenant's and Sergeant's Association, sued the City of Detroit Police Department, challenging an affirmative action plan which was being implemented to resolve allegations of employment discrimination against blacks. The suit alleged that the plan was unconstitutional because it triggered reverse discrimination and interfered with the plaintiffs' opportunities for promotion within the department. Another organization representing black police officers intervened as a defendant to defend the

47. 524 F. Supp. 1214, 1218-19 (S.D.N.Y. 1981).

48. No. 78-2310 (W.D. Tenn. Dec. 23, 1981). A similar result was reached in *Natural Resources Defense Council v. Administrator, EPA*, 595 F. Supp. 65, 70 (D.D.C. 1984), in which the court interpreted the attorney's fees provision of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(d) (1982).

49. No. 78-2310 (W.D. Tenn. Dec. 23, 1981).

50. 504 F. Supp. 841 (E.D. Mich. 1980), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *vacated on other grounds*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

plan because the organization feared the city's defense of the plan might be half-hearted. After a trial on the merits, the district court ruled against the plaintiffs, finding the plan constitutional.⁵¹

Following a ruling in defendants' favor, the defendant-intervenor successfully petitioned the court for an order requiring the losing plaintiffs to pay the defendant-intervenor's attorney's fees. Although there was no evidence that the plaintiffs had made frivolous or irresponsible claims sufficient to justify invocation of the *Christiansburg* frivolous litigation rationale,⁵² the court found that the defendant-intervenors were functional plaintiffs asserting the rights of members of minority groups. The court, therefore, concluded that the defendant-intervenors were entitled to all of the advantages which the Attorney's Fees Act usually conferred on prevailing plaintiffs. According to the court, "reverse discrimination suits are far different, procedurally and analytically, from 'ordinary' discrimination suits."⁵³ It explained: "There was sound reason to allow intervention. There was no guarantee that the City would provide extensive evidence of its own past discrimination in justification of the affirmative action plan."⁵⁴ As a consequence:

In the case at bar, it happens that the intervenors were defendants. They just as easily could have been plaintiffs or intervening plaintiffs had they, the United States, or other black police officers filed suit against the City. The Civil Rights Attorney's Fee Act is to be liberally construed to effectuate its purposes. The procedural posture of the case should not be dispositive⁵⁵

Although the tension between the different approaches to deciding attorney's fees assessment questions involving innocent volunteers is apparent, the relevant decisions rarely make more than a casual attempt to resolve it. *Kirkland's* denial of the motion for an award of fees against a reverse discrimination defendant-intervenor brushed aside contradictory cases by asserting that the intervenors' positions in those cases were frivolous while the intervenors' position in the case before it was not.⁵⁶ In *Vulcan Society of Westchester County*, an opinion awarding fees against a losing reverse discrimination intervenor used a distinction based on the content of the litigants' arguments to distinguish *Kirkland*. It stated that the *Vulcan* defendants were liable for fees because they were *defending* existing employment standards against constitutional attack. The *Kirkland* defendants were found to be different because they were *attacking* employment practices on the ground that they were unconstitutional.⁵⁷

51. *Id.* at 848.

52. See *supra* note 20 and accompanying text.

53. *Baker v. City of Detroit*, 504 F. Supp. 841, 848 (E.D. Mich. 1980), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *vacated on other grounds*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

54. *Id.* at 849.

55. *Id.* at 850.

56. See *supra* note 45 and accompanying text.

57. *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of White Plains*, 533 F. Supp. 1054, 1062 (S.D.N.Y. 1982). In *May v. Cooperman*, 578 F. Supp. 1308 (D.N.J. 1984), *aff'd in part and appeal dismissed in part*, 780 F.2d 140 (3rd Cir. 1985), losing defendant-intervenors opposed the assessment of fees on grounds that their advocacy enabled

Unfortunately, none of the approaches to the problem offers a satisfactory solution. The automatic use of the prevailing plaintiff rule to justify indiscriminate awards against all losing defendants without regard to individual circumstance triggers the dilemma of the innocent volunteer. Substantial fees can be imposed notwithstanding the fact that the litigant paying the fees is in court to advocate a particular viewpoint as a volunteer, not because the litigant has engaged in out-of-court civil rights violations. The net result is that the losing innocent volunteer is compelled to pay a penalty for speaking out on the wrong side of the controversy. Had the volunteer aligned with the winner, the volunteer would have been permitted to advocate his or her position without suffering the penalty of paying the adversary's lawyer.

The various judicial attempts to solve the problem of the innocent volunteer by conditioning fees on an assessment of whether the losers are functioning as plaintiffs rather than as defendants are even more problematic. These rulings result in the imposition of attorney's fees on those losing volunteers particular judges believe look more like defendants than plaintiffs. Therefore, the innocent volunteer found to be a functional defendant is penalized for having advocated the same viewpoint as the losing wrongdoer, and not for having violated anyone's rights.

Even more important, however, are fee assessments against innocent volunteers which raise the specter of judicial bias. The determination of whether a litigant appears to be more like a plaintiff or a defendant is an extremely subjective one with little in the way of objective standards to guide it. Therefore, a judge deciding such a question faces the irresistible temptation to distinguish functional plaintiffs from functional defendants based on the judge's personal or political assessment of the contents of the litigant's advocacy.

The contradictory decisions in *Baker*⁵⁸ and *Kirkland*⁵⁹ illustrate this. In *Baker*, the judge awarded fees to the winning defendant-intervenor and against the plaintiff. However, according to the usual construction of the prevailing plaintiff rule, the losing plaintiffs who had initiated and conducted the litigation responsibly should not have had to pay fees. Nonetheless, because the plaintiffs were white and had argued that Detroit was engaging in reverse discrimination, the trial court concluded they were more like traditional civil rights defendants and would have to pay fees because they lost. By way of contrast, in *Kirkland*, even though non-minority defendant-intervenors unsuccessfully articulated reverse discrimination claims, they were excused from having to pay fees because the court found them to bear a close resemblance to civil rights plaintiffs.

the court to better inform itself about the case. In rejecting the argument the court stated: "While [intervenors'] defense of the statute assisted in the development of the facts and law, thereby serving what I considered a valuable public function, the same could be said for the defendants in many § 1983 cases. The fee statute contemplates fee assessment against defendants notwithstanding that type of contribution." *Id.* at 1317.

58. *Baker v. City of Detroit*, 504 F. Supp. 841 (E.D. Mich. 1980), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *vacated on other grounds*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

59. 524 F. Supp. 1214 (S.D.N.Y. 1981).

C. Inadequacy of Commentators' Solutions

Commentator Brian Tamanaha would reconcile the various approaches by imposing fees on functional civil rights defendants while exempting functional civil rights plaintiffs.⁶⁰ He makes the important point that the difficulty of deciding defendant-intervenor attorney's fees questions arises because an intervenor often has many of the qualities of a typical plaintiff,⁶¹ thus confronting the courts with the problem of having to choose among plaintiffs eligible to receive the benefits of the prevailing plaintiff rule. He therefore concludes that, in order to effectuate the purposes of the Attorney's Fees Act, the courts must look behind the formal designations in the pleadings and identify the party in the case who most resembles a traditional civil rights plaintiff. This party should receive fees if it is on the winning side and should be excused from fees if it is aligned with the loser.⁶²

In order to implement his approach, Tamanaha proposes several factors to guide the courts in difficult cases. One of the factors that he believes to be important is that both of the adversaries claiming the benefit of the prevailing plaintiff rule must be "raising a claim cognizable under a civil rights statute with a fee award provision."⁶³ If a party is not raising such a claim, it cannot be considered to be entitled to any of the benefits of the Civil Rights Attorney's Fees Act. Tamanaha also believes that the courts should treat the Act's incentive for plaintiffs to initiate civil rights cases as more important than the deterrent effect that payment of attorney's fees awards will have on losing parties. Thus, he argues that the deterrent effect of attorney's fees on advocacy by functional defendants should be ignored.⁶⁴ Additionally, he suggests that the courts should look to see whether the parties claiming the benefits of the Attorney's Fees Act are really functional plaintiffs raising the kinds of civil rights claims that the Act was passed to encourage: "Courts must ask whether the party is a minority group representative asserting claims traditionally associated with civil rights or whether it is a party charging reverse discrimination because of affirmative action plans."⁶⁵ He asserts that the Attorney's Fees Act was designed to give awards to members of minority groups as a means of insuring that they would initiate litigation when they were victims of civil rights violations.⁶⁶

The difficulty with Tamanaha's approach is that the outcome depends on the viewpoint espoused by the intervenor. As a consequence, it permits judicial decisionmaking based on the ideological predispositions of the judge. This problem is highlighted by Tamanaha's selection of criteria presumably reflective of his own political predispositions. He contends that "[c]ourts must strongly favor a party found to be in a minority group."⁶⁷ However, because Tamanaha's selection of the genuine civil rights plaintiff turns on whether the plaintiff's advocacy sounds more like civil

60. Tamanaha, *supra* note 17.

61. *Id.* at 130-34.

62. *Id.* at 142-53.

63. *Id.* at 143.

64. *Id.* at 128-30, 146-48.

65. *Id.* at 148.

66. *Id.*

67. *Id.*

rights advocacy than the defendant's, the choice is really between the judge's evaluation of competing viewpoints. Put differently, in many cases, parties on both sides are advocating a position which each believes to be protective of his or her rights or beliefs. Moreover, there are parties on both sides who have not engaged in the actual violation of civil rights which is the basis of the lawsuit. Yet, if the losing voluntary intervenor advocates a position which the judge associates with civil rights plaintiffs, then the judge will conclude that the advocacy is not subject to the Act. On the other hand, if the judge concludes that the losing volunteer articulates views which are compatible with the positions of civil right violators, then the advocacy is subject to the Act and the losing volunteer will have to pay attorney's fees. In short, Tamanaha's approach boils down to the proposition that the Attorney's Fees Act favors advocacy of some views and disfavors advocacy of other views.

A student author, apparently troubled by the Tamanaha approach, has proposed an alternative which unfortunately poses similar problems.⁶⁸ He argues that losing defendant-intervenors protecting their own interests should be excused from payment of fees while losing defendant-intervenors asserting the rights of others should be liable for at least some attorney's fees. He contends that, because fee awards will discourage intervention, fairness dictates that the courts must be particularly careful not to discourage intervention by litigants whose own rights will be affected by the outcome of a case. He states:

When a defendant-intervenor argues that the remedy sought by plaintiffs would violate the intervenor's own rights, the need to maintain the intervenor's access to courts is particularly strong. When a defendant-intervenor merely seeks to defend the constitutionality of a statute from attack, the intervenor's access to the courts is still important, but it is less important in comparison because the nature of the potential harm is less severe.⁶⁹

There are several difficulties with this proposal. The most obvious is that Rule 24 of the Federal Rules of Civil Procedure requires all intervenors to have a protectable interest as a basis for their intervention. If prospective intervenors lack that interest, then no controversy exists to support their participation in a lawsuit.⁷⁰ However, assuming, as the student author apparently does, that the courts have been ignoring Rule 24 by permitting intervention by litigants whose personal interests are attenuated,⁷¹ his position still contains significant analytical problems. He argues that, for purposes of allocating fees, defense of one's own interest is more important than the defense of the interest of others. In support of this argument, he would impose fees on an intervenor whose desire to protect the interests of others makes that intervenor like the classic soap box orator rather than a typical, self-interested litigant. He recognizes that the advocacy of the defendant-intervenor has many of the

68. Comment, *supra* note 2, at 590-93.

69. *Id.* at 591.

70. See, e.g., *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985) (denying leave to right-to-life organization to intervene because it lacked a protectable interest in the outcome of a challenge to the constitutionality of an abortion statute), *cert. denied sub nom. Illinois Pro-Life Coalition, Inc., III v. Keith*, 106 S. Ct. 383 (1985).

71. See Weinstein, *Litigation Seeking Changes in Public Behavior and Institutions - Some Views on Participation*, 13 U.C. DAVIS L. REV. 231, 232 (1980) (a federal judge argues that persons affected by a court's decision in institutional litigation "should have the right to be heard before their fate is sealed").

qualities of amicus participation which is not subject to the Attorney's Fees Act.⁷² However, he brushes past this similarity in role and argues for a dissimilarity of treatment because he thinks it unfair for the civil rights plaintiff to pay all litigation costs added by the appearance of a defendant-intervenor.⁷³ He does not explain why it is fair to order an innocent volunteer who intervenes as a do-gooder to pay fees simply because the volunteer was aligned with the defendants. He merely observes that granting immunity to such intervenors would create a loophole in Section 1983⁷⁴ and would create an incentive for government defendants to allow such intervenors to carry the burden of the defense in order to save the government some money.⁷⁵

Moreover, as was true with the Tamanaha analysis, the outcome of a fees decision, under the student author's approach, may well turn on a judge's personal attitude toward the intervenor. Because Rule 24 requires that all who would intervene must have a personal stake in the litigation, the determination of whether an intervenor is actually protecting his or her rights or is speaking more generally on behalf of the rights of others may turn on the judge's attitude toward the intervenor. If the judge is personally sympathetic toward the intervenor, it will be very tempting to protect the intervenor from the burden of a substantial fee award by finding that the intervenor is protecting his or her own interests. If the judge finds the intervenor or the intervenor's views personally distasteful, the judge may have a difficult time resisting an inclination to find the intervenor liable for fees by holding that the intervenor is protecting the interests of someone else.

III. FIRST AMENDMENT CONSIDERATIONS

Notwithstanding these obvious difficulties, it cannot be denied that there is support for fee assessments against losing defendant-intervenors in the legislative history of the Attorney's Fees Act. After all, the Act was passed to create a strong incentive for private parties to come to court to seek redress of violations of their civil rights.⁷⁶ Arguably, to the extent that the courts could somehow identify the civil rights litigants that Congress sought to protect, the courts might effectuate Congressional intent by giving those litigants the benefit of the Act. Thus, assuming that one of the commentators' approaches or the existing judicial approaches correctly divines Congressional intent, that particular approach, fair or not, could arguably govern all of the relevant cases. Unfortunately, there is no way to ascertain Congressional intent on the question. The legislative record is virtually silent about it. As a consequence, judges and commentators are free to pull in contradictory directions.

It is possible to resolve the dilemma of the innocent volunteer by selecting the approach which a majority of judges have ruled is best, notwithstanding the gaps in

72. Comment, *supra* note 2, at 588-89.

73. *Id.* at 590.

74. 42 U.S.C. § 1983 (1982).

75. Comment, *supra* note 2, at 590.

76. "It is clear from the legislative history that [in enacting § 1988] Congress valued suits by the general public and sought to stimulate private enforcement of the civil rights laws by reinstating a system of fee awards. . . . The statute was particularly aimed at encouraging litigation in areas where only nonpecuniary relief was available." Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 350-51 (1980).

the Attorney's Fees Act's legislative history. Unfortunately, to the extent such a resolution of the question concerning imposition of fees on intervenors permits imposition of fees on innocent volunteers, it cannot be squared with established first amendment doctrines defining the rights of access to the courts. This is due to the fact that whenever an innocent volunteer is ordered to pay attorney's fees, the order is based on the volunteer's in-court advocacy, not his out-of-court wrongdoing.

As a consequence, whatever Congress intended, the imposition of fees on an advocate who has articulated the views of the losing side has the characteristics of censorship. The Supreme Court, however, has consistently held that judicial proceedings are a proper forum for the expression of political, social, and economic views. It has also held that the imposition of penalties and burdens on individuals for having employed litigation to exercise the right to communicate are impermissible restrictions on speech.⁷⁷ Thus, the Court has invalidated restrictions on access to the courts imposed on business organizations, civil rights organizations, and labor unions seeking to use the courts as a forum for expression. While the Court has yet to apply the principles of the access-to-the-court cases to a defendant-intervenor faced with a fees assessment, an analysis of the doctrine indicates that the cases provide an appropriate framework of analysis.

A. *The Right to Petition for Redress of Grievances*

The clearest articulation of the first amendment guarantee of access to the courts appears in the United States Supreme Court cases holding that antitrust penalties cannot be imposed on trade associations engaged in litigation and lobbying designed to give the associations or their members an advantage in the economic marketplace. The Court has also held that a first amendment right of access exists to protect an employer against sanctions imposed under the National Labor Relations Act because he has filed a defamation suit against employees engaged in a union organizing campaign.

The first amendment doctrine which precludes enforcement of the antitrust laws against trade associations for resorting to litigation as a means to gain a competitive edge is commonly known as the *Noerr-Pennington* doctrine.⁷⁸ The doctrine also extends to the application of antitrust laws to efforts to restrain trade by lobbying or otherwise trying to persuade public officials. The *Noerr-Pennington* doctrine was first articulated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*⁷⁹ In that case, railroads in Pennsylvania engaged in concerted efforts to improve their competitive position against the trucking industry by engaging in a successful publicity campaign supportive of legislation burdensome to the trucking business.

77. See Annotation, *The Supreme Court and the First Amendment Right to Petition the Government for a Redress of Grievances*, 30 L. Ed. 2d 914 (1973).

78. See generally Note, *Noerr-Pennington Immunity from Antitrust Liability Under Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception with a Constitutional Analysis*, 69 CORNELL L. REV. 1305 (1984); Note, *The Sham Exception to the Noerr-Pennington Doctrine*, 11 HASTINGS CONST. L.Q. 329 (1984); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977).

79. 365 U.S. 127 (1961).

The truckers persuaded the lower courts that the railroads' publicity campaign violated antitrust laws. However, the Supreme Court held that the Sherman Act was inapplicable to joint efforts to gain a competitive edge in the marketplace which were comprised of activities designed to influence the passage or enforcement of the laws. In the Court's view, a construction of the antitrust laws to prohibit such activities would raise important questions under first amendment doctrines protecting the right to petition government for redress of grievances.⁸⁰

A few years later, in *United Mine Workers v. Pennington*,⁸¹ the Court amplified the *Noerr* holding. In *Pennington*, owners of large coal mines and union officials combined efforts to persuade the Secretary of Labor and officials of the TVA to increase the minimum wages of miners and to confine coal purchases to coal produced at the increased minimum wages. Owners of small mines sued on grounds that the combination of the owners of larger mines and union officials violated the antitrust laws. The *Pennington* Court extended its earlier decision in *Noerr* by holding that the antitrust laws could not reach communications activities designed to influence economic decisionmaking by public officials outside of the legislative arena.⁸²

Finally, in *California Motor Transport Co. v. Trucking Unlimited*,⁸³ the Supreme Court moved beyond its efforts to construe antitrust statutes to avoid conflict with the first amendment and explicitly concluded that the first amendment would be violated if trade organizations were punished for antitrust violations because they sought favorable rulings from judicial and administrative tribunals. In that case, plaintiff motor carriers initiated an antitrust suit alleging that the defendants had attempted to monopolize trucking in California by instituting legal proceedings "with or without probable cause, and regardless of the merits of the cases."⁸⁴ Plaintiffs contended that costly but groundless proceedings were initiated every time they applied to government agencies for permission to operate trucks in California. The Court held that use of litigation as a sham device to obstruct an opponent's business operations was not a constitutionally protected activity. However, it also made clear that the first amendment protects responsible use of judicial and administrative tribunals:

We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.⁸⁵

80. *Id.* at 137-38.

81. 381 U.S. 657 (1965).

82. The Court stated: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.* at 670.

83. 404 U.S. 508 (1972).

84. *Id.* at 512.

85. *Id.* at 510-11.

Thus, antitrust laws could be invoked only if there was evidence that the use of the proceedings was a "sham" designed to disrupt or harass rather than to persuade.⁸⁶

Prior to 1983, the *Noerr-Pennington* doctrine had been confined to antitrust cases. However, in *Bill Johnson's Restaurants, Inc. v. NLRB*,⁸⁷ the Supreme Court applied the doctrine in a labor relations case to protect an employer's right of access to the courts. The Court held that the National Labor Relations Act could not be construed to bar an employer from filing a defamation suit against employees attempting to organize a union. It overturned a National Labor Relations Board (NLRB) finding that the filing of the suit constituted an unfair labor practice. Relying on the *California Motor Transport Co.* decision, the Court ruled that an employer's right to initiate litigation was protected by the first amendment right of access to the courts even though the litigation was filed during the course of a labor organizing campaign and was capable of burdening that campaign. Echoing the sham exception articulated in the *Noerr-Pennington* cases, the Court also stated that the employer would lose its constitutional protection only if both the state courts and the NLRB dismissed the employer's case as groundless, and the NLRB found that the suit was brought to impede the union from organizing.⁸⁸

In addition to protecting access to the courts in economic controversies, the Supreme Court has also held that the right of access to the courts extends to groups formed to achieve political and social goals. This holding is premised on the assumption that an important dimension of freedom of speech is the ability of individuals with shared viewpoints and goals to associate with one another in order to make their political advocacy more effective. Thus, the Court interprets the first amendment right to freedom of association as prohibiting government from enforcing laws and regulations restraining civil rights organizations and unions from using legal proceedings as part of their advocacy activities.

NAACP v. Button,⁸⁹ the first case holding that the right of access to the courts protects activities of political and social organizations, was decided during the height of the civil rights movement. In that case, the Supreme Court invalidated state restrictions on the practice of law which precluded the NAACP from searching the community for black persons with civil rights grievances and referring them to NAACP-affiliated attorneys. The Court rejected Alabama's arguments that the referral activities constituted unlawful solicitation of clients, saying that:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all

86. *Id.* at 515-16.

87. 461 U.S. 731 (1983). For a critique of this case, see Wilson, *Retaliatory Lawsuits, the NLRA, and the First Amendment: A Proposed Accommodation of Competing Interests*, 38 VAND. L. REV. 1235 (1985) (proposing that even if injunctions against retaliatory lawsuits are violative of the first amendment in some situations, they should be allowed when they are in the form of temporary injunctions which expire after the labor dispute has been resolved). See also Comment, *Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions Through Application of the Noerr-Pennington Doctrine*, 31 AM. U.L. REV. 147 (1981) (arguing that the *Noerr-Pennington* line of cases protect citizens who complain to the government from libel suits based on the alleged falsity of those complaints).

88. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743-44 (1983).

89. 371 U.S. 415 (1963).

government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.⁹⁰

Although it cited the right to petition for redress of grievances in support of its decision, the Court stated that it did not intend that the rationale of the opinion be confined to a "narrow, literal conception of freedom of speech, petition or assembly."⁹¹ Instead, the *Button* holding was framed in terms of the right "to engage in association for the advancement of beliefs and ideas."⁹²

Subsequent to *Button*, the protection accorded to the NAACP was extended to labor unions as well. In *Brotherhood of Railroad Trainmen v. Virginia*,⁹³ the Supreme Court overturned a state regulation of the practice of law which prohibited a union from referring union members with employment-related injuries to lawyers identified by the union as specialists in such cases. Although, as a general rule, such referrals are viewed suspiciously by both bench and bar as a form of unauthorized practice of law, the Court held that, since union members were being referred by their own union, the referral mechanism was constitutionally protected. It explained:

The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. . . . And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other.⁹⁴

Later, in *In re Primus*,⁹⁵ the Supreme Court explicitly held that the first amendment protected some forms of attorney solicitation of clients to initiate litigation. In *Primus*, an attorney doing volunteer work for the American Civil Liberties Union (ACLU) asked an indigent woman to become a plaintiff in an ACLU-supported case alleging that the continued receipt of welfare funds was being unconstitutionally conditioned on recipients' agreements to undergo sterilization. The Court held that state anti-solicitation laws were unconstitutional as applied to the ACLU solicitation activities. It explained that the solicitation activity of the ACLU attorney "comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public."⁹⁶

B. Applying the First Amendment to the Dilemma of the Innocent Volunteer

Considered together, the right of petition and freedom of association cases represent a doctrinal commitment by the Supreme Court to treat access to the courts

90. *Id.* at 429.

91. *Id.* at 430.

92. *Id.* at 430 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

93. 377 U.S. 1 (1964).

94. *Id.* at 6.

95. 436 U.S. 412 (1978).

96. *Id.* at 431.

for purposes of advocacy as a constitutionally protected right.⁹⁷ The petition cases treat litigation as a legitimate forum to persuade the judiciary in a fashion akin to the way that public forum cases treat statehouse grounds as an appropriate forum to persuade the legislature or the governor. The freedom of association cases treat a civil rights or labor organization's efforts to solicit attorneys and to refer members to attorneys as an integral part of the organization's work in achieving its social and political goals. Thus, the imposition of regulations or restrictions interfering with access to the courts interferes with first amendment activities designed to accomplish those goals.

The principles applied in the right to petition and the associational freedom cases are equally applicable to innocent volunteer cases.⁹⁸ The innocent volunteer cases pose the same constitutional issues that the right to petition and associational freedom cases have already resolved. The innocent volunteer seeks access to the courts in order to advocate a legal position which, if successful, will result in implementation of the public policy or constitutional policy which the volunteer often advocates simultaneously in other forums.⁹⁹ In some cases, the innocent volunteer is a member of a majority group advocating a legal position which, if adopted by the courts, will protect the volunteer against the burdens of government-imposed affirmative action plans triggered by the civil rights violations of others. Even if the volunteer gets an advantage in hiring or promotion due to a civil rights defendant's violations of the plaintiff's civil rights, the volunteer is not the perpetrator of those violations. Thus, the white union member who challenges restrictions on career advancement created by an affirmative action plan is not guilty of the discrimination that may have given whites an initial advantage over minority employees and applicants.¹⁰⁰ Similarly, in the typical abortion case where an innocent volunteer is aligned as a defendant, the volunteer is usually a representative of a right-to-life organization which also lobbies

97. The only case which suggests the reluctance of the Supreme Court to extend the first amendment right of access to the courts beyond presently decided cases is *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985), which sustained a law prohibiting all attorneys appearing before the Veterans Administration in disability benefits cases from receiving more than \$10 per case. The Court in *Walters* rejected first amendment and due process attacks on the ground that there was no right to be represented by paid counsel in non-adversary, administrative proceedings for which volunteer or pro-se representation had been determined by Congress to be available and preferable. *Walters* probably does not signal the inapplicability of the right-of-access cases to the dilemma of the innocent volunteer for two reasons. First, veterans are not barred or penalized for choosing to appear in non-adversary administrative proceedings to obtain their benefits. They are entitled to pro-se access or access using the assistance of volunteers whom the Court assumes are readily available. Moreover, a majority of the justices reserved consideration of the first amendment and due process claims to cases where there was a showing that pro-se or volunteer representation was inadequate. Second, no paid counsel representing any party, including the government, participates in the proceedings. Thus, the \$10 fee restriction assures that the proceeding will not become dominated by lawyers whose presence will increase the expense and delay of the proceedings. Congress' effort to structure the proceedings so that no lawyers participate in the hearings is distinguishable from the dilemma of the innocent volunteer who suffers from the deterrent effect of a burden which is statutorily imposed only when the volunteer is aligned with the losing side.

98. One student commentator argues a similar position with respect to the right of indigent prisoners to use the courts. See Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973).

99. *Keith v. Daley*, 764 F.2d 1265, 1267 (7th Cir. 1985), cert. denied sub nom. *Illinois Pro-Life Coalition, Inc.*, III v. *Keith*, 106 S. Ct. 383 (1985).

100. The district court, in *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of White Plains*, 533 F. Supp. 1054, 1061 (S.D.N.Y. 1982), made this point in its opinion.

in the legislature to support passage of the anti-abortion laws.¹⁰¹ However, unlike the government defendants in abortion cases, the innocent volunteer lacks the legal capacity to enforce the challenged law.

The innocent volunteer, like the trade association, the employer, the civil rights organization, and the union, acts solely as an advocate to bring his or her viewpoint to the attention of the courts. In the course of deciding right to petition and associational freedom cases, the Supreme Court has repeatedly indicated that "it would be destructive of rights of association and of petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view"¹⁰² Yet, the imposition of a substantial pecuniary burden on the innocent volunteer is the equivalent of a restriction on use of these same "channels and procedures." Would-be volunteers who face the risk of attorney's fees for appearing in litigation to advocate their viewpoints must stay their hands if they do not have sufficient funds available to pay the adversary's fee in the event the volunteer's advocacy is unsuccessful.

The dilemma of the innocent volunteer poses even more serious constitutional problems than the issues addressed by the right to petition and political association cases. In the latter cases, the burden on access to the courts was defended on the grounds that the challenged restrictions applied to everyone who engaged in the prohibited conduct. However, in the case of the innocent volunteer, the burden on access is only imposed if the position advocated by the volunteer is rejected in court. If the volunteer takes a position which puts it on the winning side, the volunteer has no obligation to pay the opponents' fees. Thus, the Attorney's Fees Act rewards successful advocacy and punishes unsuccessful advocacy. When the outcome of a case is used as the test which decides whether innocent volunteers should pay fees, it is inconsistent with traditional first amendment policies that prohibit discrimination among ideas and promote the free flow of communication into the marketplace of ideas. Rewarding only successful advocacy skews the flow of ideas in favor of those which meet with judicial approval.¹⁰³

One of the most puzzling aspects of the cases posing the dilemma of the innocent volunteer is that they focus on questions of statutory construction and neglect first amendment doctrines.¹⁰⁴ This neglect may be due to the automatic—almost indiscriminate—way in which attorney's fees have been assessed against losing defen-

101. *Keith v. Daley*, 764 F.2d 1265, 1267 (7th Cir. 1985), *cert. denied sub nom. Illinois Pro-Life Coalition, Inc.*, 106 S. Ct. 383 (1985).

102. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

103. In other communications contexts the Supreme Court has invalidated constraints on communications which have had the effect of skewing the flow of ideas into the marketplace. *See generally* Stone, *Fora Americana: Speech in Public Places*, (1974) SUP. CT. REV. 233.

104. The only reference to the possibility that first amendment policies are relevant to questions posed by assessment of court awarded attorney's fees appears in a student article in the *Harvard Journal on Legislation*. *See* Comment, *supra* note 2. However, the author brushes aside the first amendment with the following comment: "Recourse to constitutional doctrine is not necessary, however, to prevent attorneys' fee awards from burdening access to the courts. The burden can be prevented with appropriate statutory interpretation." *Id.* at 586. He even includes a footnote which recognizes the applicability of the cases relied on in this article. *Id.* at 587 n.36. Unfortunately, the author proposes a construction which finds no stronger support in the statute and the legislative history than do competing interpretations.

dants who have appeared in civil rights cases. While the vast majority of these assessments are against losing defendants guilty of civil rights violations, it is but a short step to confusing the innocent volunteer with the actual wrongdoer. The volunteer appears on the same side of the case as the wrongdoer, urges similar legal positions on the court, and exerts efforts which add to the winner's costs. However, in spite of these similarities, the innocent volunteer is not, in fact, a wrongdoer.

While many arguments can be made in favor of treating the innocent volunteer like other losing parties, none seem analytically sound. One such argument is that if the first amendment is construed to protect the innocent volunteer, it will be applicable to protect losing wrongdoers who are also advocating viewpoints and trying to persuade judges. The underlying fear is that the Act will be completely subverted.¹⁰⁵ This argument completely overlooks the fact that, unlike the innocent volunteer, the losing wrongdoer has been found to have acted unlawfully. Admittedly, an important purpose of the Attorney's Fees Act is to create an incentive for the wrongdoer's victims to seek private redress from the wrongdoer. The promise of fees to the successful plaintiff creates that incentive. However, because fees create an incentive to seek redress from the wrongdoer, they serve a purpose unrelated to the content of "in-court" advocacy. The victim comes to court to recover from the wrongdoer. Fees calibrated to the costs of the in-court advocacy merely serve to assure that the wrongdoer will pay both for the actual harm and the costs of redressing that harm.

The *California Motor Transport Co.*¹⁰⁶ case exemplifies the special care employed by the Supreme Court in protecting access to the courts without interfering with the legislative and judicial power to punish genuine wrongdoing. In that case, the Court, while stating that access to the courts was a constitutionally protected right, made clear that abuse of that right can be punished. If legal proceedings are a sham, filed for purposes of obstruction, and not for the purpose of persuading an official decisionmaker to reach a particular result, then the initiation of the proceedings is not constitutionally protected.¹⁰⁷ Thus, if a litigant is guilty of in-court or out-of-court misconduct, the first amendment is no bar to the imposition of appropriate penalties. Application of the rationale of the *California Motor Transport Co.* case to the question of attorney's fees would protect a party to civil rights litigation who was in court solely to try to persuade; it would not protect the civil

105. The student author fears that if innocent volunteers on the losing side were not liable for fees, cost conscious government entities that were target defendants would shirk putting on a vigorous defense of the case against them in order to invite intervention by outsiders insulated from the paying of attorney's fees in the event of a loss. Comment, *supra* note 2, at 590. This fear is unrealistic. First, there is nothing in the Act which precludes a losing wrongdoer from paying the entire fee, even if intervenors are present in the case. Indeed, although the Act does not require it, neither does the Act forbid imposing all attorney's fees on the losing wrongdoer. It was the wrongdoer's misconduct which inflicted the harm and triggered the case. Moreover, the purpose of the Act is to repay the expenses of the prevailing civil rights plaintiff. Therefore, Congress has not precluded fee awards which compensate for conniving or "accommodation" between defendants and defendant-intervenors which has occurred in order to avoid fees. Second, any litigant who relies on outsiders and dilutes efforts to defend in order to save money must pay for the samaritan's mistakes. If the samaritan, motivated by zeal rather than self-interest, is ineffective at putting on a case, the disingenuous target defendant must suffer the consequences of any adverse ruling.

106. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

107. *Id.* at 515-16.

rights violator or innocent volunteer who abused the judicial process by raising groundless arguments.

Another argument which is often made to justify imposition of fees on an innocent volunteer is that the volunteer willingly has chosen to align itself with the losing wrongdoer and should therefore be treated as the equivalent of the wrongdoer.¹⁰⁸ However, the volunteer is a speaker, not a wrongdoer. Therefore, imposing fees on the volunteer is the equivalent of imposing a tax on the volunteer for speaking. The Court has consistently held that a tax cannot be imposed simply for speaking.¹⁰⁹ Speech is a highly valued right and, like other preferred rights, it is not ordinarily subjected to taxation unless the tax is imposed for reasons other than the fact that communication occurs.¹¹⁰

The imposition of fees on innocent volunteers is all the more objectionable because its imposition turns on the viewpoint of the speaker. Thus, as we have seen, the losing viewpoint pays and the winning viewpoint receives payment. To the extent that particular viewpoints are not approved by the caselaw, the proponents of those viewpoints are more likely to be on the losing side that pays fees. For example, constitutional doctrines governing abortion are presently protective of individuals who wish to procure abortions. Parties who intervene as defendants to oppose a constitutional attack on laws restricting abortions therefore run a far greater risk of losing and having to pay attorney's fees than the parties who appear on the side of prevailing plaintiffs in opposition to abortion restrictions. Thus, opponents of abortion are far more likely to pay fees than are proponents of free choice in the matter.¹¹¹

It can also be argued that the innocent volunteer who has intervened as a defendant should pay fees because the volunteer should have selected an amicus role rather than the role of an intervenor.¹¹² Like the other arguments, this argument also ignores the constitutional priority ordinarily given speech activities. Whether a party chooses to participate actively in litigation as an intervenor or to assume the more passive role of amicus often turns on whether the party thinks active participation in a case would be a more effective mode of communication than amicus participation. If the party concludes that direct participation will enable more effective communication and a court permits the party to file an appearance, imposing fees on that party is the equivalent of imposing a penalty for selecting the most effective means to communicate. The argument that the losing volunteer should have been an amicus assumes that the opportunity to engage in maximally effective speech activities is subordinate to the statutory interests of a prevailing plaintiff in collecting fees. It also

108. Comment, *supra* note 2, at 591.

109. See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (voids use tax levied on paper and ink consumed by large newspapers); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (voids flat licensing tax imposed on sale of religious literature).

110. 460 U.S. 575, 581 (1983); 319 U.S. 105, 115-17 (1943).

111. The possible link between a discriminatory tax and censorship is discussed in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

112. Comment, *supra* note 2, at 588-89.

assumes that the existence of a less effective means of advocacy justifies burdens on more effective means.¹¹³

In addition, it can be argued that the presence of an innocent volunteer on the losing side has the effect of increasing the litigation costs of the winner and delaying the winner's exercise of constitutional rights. Thus, it would seem equitable for the losing volunteer to pay the increased litigation costs and the costs of delay that the intervention has occasioned. However, while it is undeniable that the losing intervenor increases the plaintiff's costs and delays the plaintiff's benefits, increased cost and delay do not justify the imposition of fees on the intervenor. Both the original civil rights plaintiff and the defendant-intervenor have a constitutionally protected right of access to the courts. The civil rights plaintiff is granted this right because that individual is a victim seeking a forum for redress of grievances; the defendant-intervenor is granted this right because a court has ruled that he or she has a sufficiently tangible interest in the final outcome to be entitled to petition the court to protect that interest. The fact that one is a winner and the other is a loser does not change this fact. Both have a right to be in court, and both are exercising that right by engaging in advocacy. Moreover, neither is a wrongdoer. Increased costs and delayed benefits to the plaintiff are merely an incidental result of the intervenor's exercise of the right of access.

Finally, it might be argued that even if the first amendment right of access protects advocacy of viewpoints, many innocent volunteers are really present in the litigation to protect personal, non-first amendment interests. For example, a pediatrician who intervenes to defend the constitutionality of an anti-abortion law solely because he or she fears that increased abortions will affect his or her income can be said to be advocating a non-ideological position. Nonetheless, whatever the physician's motive, he or she has committed no civil rights violations. This intervenor is merely using litigation as a forum to advocate a viewpoint and is therefore exercising the right to petition for redress of grievances or right of associational advocacy. The right of access cases make clear that advocacy for private or pecuniary benefit is indistinguishable from altruistic advocacy. Thus, in the *Noerr-Pennington* cases, the use of the courts for the purpose of gaining a competitive edge in the economic marketplace did not justify invocation of antitrust remedies. This is consistent with the view that it is the presence of advocacy, not its content or the motive of the advocate, that triggers first amendment protection.¹¹⁴

It is most consistent with the right of access cases that both the prevailing plaintiff and the innocent volunteer defendant should each absorb their own costs when pitted against one another, no matter who wins. Both are in court as advocates.

113. It is also possible to criticize the insistence that the innocent volunteer should pay because he failed to choose the least effective means of court-related communication on grounds that it ignores the so-called least restrictive means test. See *United States v. O'Brien*, 391 U.S. 367, 377-78 (1968).

114. The presence of such a distinction is critical to the student author's analysis. See *supra* notes 68-75 and accompanying text. It should also be noted that the student author suggests that the opposite argument also supports the imposition of fees on innocent volunteers aligned with losing defendants. He argues that the volunteer with a palpable interest in the outcome should not have to pay fees because the fees might discourage the volunteer's participation in the litigation. Comment, *supra* note 2, at 590-93.

Neither has violated the rights of the other. The prevailing plaintiff can recover at least some costs from the losing wrongdoer. Assuming that the courts will not permit the prevailing plaintiff to collect volunteer-generated costs from the losing wrongdoer, failure to recover the volunteer-generated costs will undoubtedly undercut some of the incentive that the Act was intended to create. To the extent that some of the incentive is lost, the loss only occurs because the policy of the first amendment has traditionally taken precedence over the policy of the Attorney's Fees Act or other statutes in the absence of sufficiently strong, countervailing societal interests.¹¹⁵

The application of the first amendment to individual cases involving innocent volunteers is a fairly simple matter. In every case in which attorney's fees are sought under the Attorney's Fees Act by a prevailing plaintiff, the court should look to see whether the losing party is an innocent volunteer. If the party has voluntarily initiated or intervened in the litigation, if the party is guilty of none of the conduct for which relief is sought, and if the party has taken responsible legal positions within legitimate limits of advocacy without relying on frivolous arguments and improper tactics, then that party is an innocent volunteer whose speech should be constitutionally protected. This protection should apply even if the volunteer has the misfortune of appearing on the losing side.

Thus, in *Vulcan Society*,¹¹⁶ the first amendment should have precluded an award of attorney's fees against the intervening defendant firefighters' union making reverse discrimination claims. The union was present in court as a volunteer to advocate a viewpoint and was innocent of any wrongdoing. The imposition of fees was therefore nothing more than a penalty for having spoken out on the losing side. The same can be said of the award of attorney's fees against right-to-life volunteer intervenors in *Charles v. Daley*¹¹⁷ and *Akron Center for Reproductive Health*.¹¹⁸

Similarly, in *Baker v. City of Detroit*,¹¹⁹ the first amendment should have precluded the award of attorney's fees against the losing plaintiffs raising reverse discrimination claims. They were innocent volunteers who had availed themselves of the right of access to the courts by initiating a legal challenge to an affirmative action plan they believed to be unlawful. Requiring the plaintiffs to pay the fees of the minority group defendant-intervenors was the equivalent of penalizing them for having advocated the wrong viewpoint. The presence of minority group intervenors on the prevailing side did not change this fact. It may be that the minority group intervenors were entitled to fees under the policy of the Attorney's Fees Act. Such a

115. See, e.g., *United States v. Grace*, 461 U.S. 171, 176-78 (1983). See also *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

116. *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of White Plains*, 533 F. Supp. 1054 (S.D.N.Y. 1982). See *supra* text accompanying notes 37-39.

117. *Charles v. Daley*, Nos. 79-C-4541 & 79-C-4548 (N.D. Ill. April 22, 1985), *motion to amend denied*, Nos. 79-C-4541 & 79-C-4548 (N.D. Ill. March 6, 1986) (LEXIS, Genfed library, Dist file), *appeal docketed*, No. 86-1552 (7th Cir. April 9, 1986). See *supra* text accompanying notes 40-42.

118. *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268 (N.D. Ohio 1984). See *supra* text accompanying notes 43-44.

119. *Baker v. City of Detroit*, 504 F. Supp. 841 (E.D. Mich. 1980), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *vacated on other grounds*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). See *supra* text accompanying notes 50-55.

construction of the Act certainly is a plausible one. Nonetheless, if the first amendment interests are to be given due weight, the Act is insufficient to override the right the *Baker* plaintiffs had to exercise their right of access to the courts.

In contrast, the *Kirkland*¹²⁰ decision in which the court refused to award fees against a correctional officers' union was consistent with first amendment principles. The union appeared as a defendant-intervenor to argue its viewpoint to the court. Its innocence of having violated anyone's civil rights is sufficient to identify it as a speaker rather than a wrongdoer. The unwillingness of the *Kirkland* court to award fees under such circumstances is consistent with the rationale of the right of access cases. Speakers should have a full opportunity to advocate their views without suffering any penalties, pecuniary or otherwise.

IV. CONCLUSION

Continued failure to apply first amendment doctrines to defendant-intervenors voluntarily present in litigation will have the effect of deterring prospective volunteers from intervening in cases to make their voices heard. Although civil rights plaintiffs' attorneys who reap the benefits of the fees presently being recovered from defendant-intervenors are not likely to complain, first amendment policies are being ignored. The imposition of fees is a tax on speech which deters it. Thus, the real cost of the fees is that they will result in the suppression or reduction of court-related advocacy. If such fees are avoided, active participation in civil rights litigation by defendant-intervenors and other innocent volunteers will continue without the burden of pecuniary penalties and will assure maximum opportunity for courts to be exposed fully to all viewpoints during the course of litigation. It will also assure that innocent volunteers of all ideological stripes will have an equal opportunity to appear in court.

120. *Kirkland v. New York State Dep't of Correctional Serv.*, 524 F. Supp. 1214 (S.D.N.Y. 1981). See *supra* text accompanying notes 45-47.